No. 91-7604

IN THE

Supreme Court of the United States

October Term, 1992

JEFFREY ANTOINE,
Petitioner,
v.
BYERS & ANDERSON, INC. AND
SHANNA RUGGENBERG,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Johnathan and Karen Scott respectfully move for leave to file the attached brief *amicus curiae* in support of the petitioner in this case. The consent of

the attorney for the petitioner has been obtained and is attached. The consent of the attorneys for the respondents was requested, but refused.

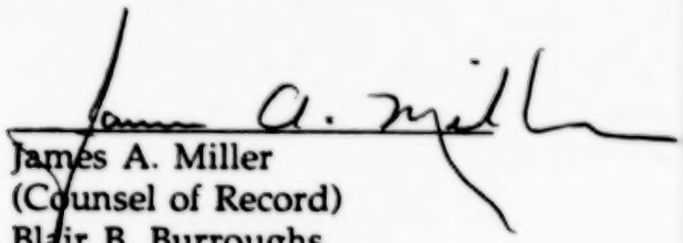
The interest of the Scotts in this case arises from the fact that they and the respondents in this action are parties to a lawsuit presently pending in the courts in Washington State. *Scott v. Byers & Anderson, Inc., et al.*, Superior Court for the State of Washington In and for Pierce County, Cause No. 88-2-09876-5. The subject of that case is the failure of Shanna Ruggenberg to record properly and to transcribe promptly the proceedings of a federal trial in which the Scotts were parties.

The central issue in *Scott v. Byers & Anderson* is identical to the main issue before this Court, namely, whether the respondents are entitled to absolute judicial immunity from tort liability. It is probable that the Court's decision in this case will be determinative of the Scotts' rights in their state court lawsuit against respondents.

Petitioner Antoine in the Court of Appeals and in his brief before this Court has focused his argument on the question whether a court reporter is entitled to absolute or qualified immunity for conduct in an official capacity which violates constitutional rights. In so doing, petitioner has essentially treated Shanna Ruggenberg and Byers & Anderson, Inc., as one, even though the Ninth Circuit Court of Appeals made separate holdings immunizing respondents from liability. The brief which the Scotts as *amici curiae* are requesting permission to file will contain a more complete argument on the question whether respondents should be treated as one. The brief is intended to point out that there is a separate analysis which should be applied to the question whether Byers & Anderson, Inc., is entitled to any immunity. If this argument is accepted, it would form a basis for finding Byers & Anderson, Inc., subject to liability even if it is

held that Ruggenberg is absolutely immune from suit.

Respectfully submitted,



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No. 91-7604

IN THE SUPREME COURT OF THE UNITED STATES

February Term, 1993

JEFFREY ANTOINE,

Petitioner,

v.

BYERS & ANDERSON, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT

The following facts, of which the Court may take judicial notice, are contained in the public court records of *Scott v. United States*, United States District

Court for the Western District of Washington at Tacoma, DC# CV-84-737-T; *Scott v. United States*, United States Court of Appeals for the Ninth Circuit, No. 86-4017, reported at *Scott v. United States*, 884 F.2d 1280 (9th Cir. 1989); and *Scott v. Byers & Anderson, Inc., et al.*, Superior Court for the State of Washington In and for Pierce County, Cause No. 88-2-09876-5.

It is probable that the Court's decision in this case will be determinative of the Scotts' rights in their lawsuit against respondents. These facts are presented so that the Scotts' interest in the outcome may be more fully understood. The pertinent facts are essentially parallel to those in this case.

Shanna Ruggenberg ("Ruggenberg"), an employee of Byers & Anderson, Inc. ("Byers & Anderson"), was the court reporter at the trial of a medical malpractice action brought against the federal government by the Scotts in the United States District Court for the Western District of Washington.

When plaintiffs' case came on for trial, the district court was operating under an emergency

situation with respect to court reporting services. The emergency situation was caused by the release of an official court reporter from his employment.

During the emergency situation, the district court contracted with Byers & Anderson for the provision of court reporting services. No written contract was entered into. Byers & Anderson had complete discretion as to which reporter to send to the district court. Ruggenberg was the person provided by Byers & Anderson.

The Scotts' original lawsuit was tried before the Honorable Jack Tanner in the United States District Court for the Western District at Tacoma, Washington, in the spring of 1986. The evidence at trial showed, and the trial court found, that Johnathan was born prematurely and in a hypoxic (oxygen starved) condition as a result of negligent medical care provided by government employees before, during, and after Johnathan's birth. Johnathan's negligent medical treatment caused an abnormal brain condition

which has resulted in his suffering from spastic quadriplegia, a form of cerebral palsy.

Johnathan is, at most, only mildly retarded. He has, however, severe neurological problems which impair his motor and communication skills. He cannot stand, walk, sit independently, or feed and care for himself. He needs computer assisted devices to communicate effectively. Johnathan will always require special equipment, lifetime attendant care, and medication, as well as extensive medical, physical, occupational, and speech therapy.

Plaintiffs were awarded judgment against the United States in the total amount of $11,101,000.21. The award included compensation to Johnathan for pain, suffering, and physical impairment; funds to provide for loss of future income; funds to pay for lifetime attendant care, medical services, supplies, and equipment; and compensation to Karen Scott for damage to the parent-child relationship. *Scott v. United States*, 884 F.2d 1280, 1282 (9th Cir. 1989).

At the conclusion of trial on May 8, 1986, the United States Attorney orally ordered a transcript of the proceedings from Ruggenberg. When the United States filed its Notice of Appeal on August 19, 1986, it also submitted a "Transcript Designation and Ordering Form." Under FRAP 11(b), Ruggenberg should have filed the trial transcript on or before September 18, 1986--thirty days after the transcript had been ordered. As discussed below, no transcript became available for appeal until a year and one-half later.

On October 2, 1986, Ruggenberg filed a motion for extension of time for filing the transcript and gave an estimated filing date of November 2, 1986. Ruggenberg advised the court that a backlog of work had caused the delay. The court granted the motion on October 22, 1986.

The transcript was not filed when promised. On November 3, 1986, Ruggenberg filed a second motion for extension of time, giving an estimated filing date of December 2, 1986. She again cited backlog as the reason

extension. The court granted this motion on November 19, 1986.

After Ruggenberg failed to file the transcript on December 2, 1986, counsel for the Scotts brought a motion to dismiss the appeal of the United States for failure to file the trial transcript. The motion was based, among other things, upon the affidavit of Dr. Stephen T. Glass, one of Johnathan's treating physicians. Dr. Glass stated in his affidavit that Johnathan required more physical therapy, occupational therapy, speech therapy, and non-vocal communication development therapy than was available to him through the public school system. Further, the delay in providing such additional therapy would irreversibly diminish the level to which Johnathan could improve in the future. The Scotts alleged that the delay in filing the trial transcript was, at the time plaintiffs moved to have the appeal dismissed, unreasonable.

In mid-December 1986, Ruggenberg filed a third motion for extension of time, estimating the transcript

would be filed on January 23, 1987. The reason cited for the need for an extension was again backlog. The transcript was not filed in January; nor was it filed in February. By this time, Ruggenberg had made numerous representations regarding production of the trial transcript to various individuals. In November 1986, she represented that a good portion of the trial transcript had been completed. She advised plaintiffs' counsel that portions of the transcript would be filed by February 6, 1987. No portion of the transcript was filed by that date. In addition, Ruggenberg did not respond to the efforts by Bruce Rifkin, Clerk of the United States District Court for the Western District of Washington, to obtain the transcript.

By a pleading dated March 3, 1987, Ruggenberg filed a fourth motion for extension of time. She indicated that the estimated filing dates would be March 9, 1987, for a portion of the transcript and March 13, 1987, for the remainder. Again, Ruggenberg failed to file the trial transcript as promised.

By order filed on March 4, 1987, the Ninth Circuit Court of Appeals directed Ruggenberg to file the transcript within 14 days. The court also ordered her to show cause why financial sanctions should not be imposed against her if the transcript was not filed by March 18, 1987. The transcript was not filed by March 18. In a second order filed on April 22, 1987, the Ninth Circuit observed that Ruggenberg had failed to respond to the March 4, 1987, order and had consistently failed to explain adequately her delays in filing the transcript. The court ruled that if she failed to file the transcript within seven days of the entry of the order, she would pay $100.00 per day to the court clerk until she filed the transcript. The Ninth Circuit Court of Appeals also ordered that Ruggenberg be incarcerated unless she filed the entire transcript within 28 days.

On May 15, 1987, the transcript still not having been filed, the Scotts brought a motion seeking an order directing Ruggenberg to return all records of trial proceedings to the district court for the purpose of turning such records over to Karen Larson, President

Elect of the Washington Shorthand Reporters' Association, to complete transcription of the trial record.

After Ruggenberg failed to follow the first two orders of the Ninth Circuit requiring production of the Scotts' trial transcript, the court entered a third order on June 11, 1987. The court observed that Ruggenberg had failed to respond to or comply with the prior orders. Accordingly, the court ordered Ruggenberg to show cause in writing within 14 days why she should not be incarcerated. Ruggenberg again failed to respond to the court's directive. This was noted by the Ninth Circuit Court of Appeals on July 10, 1987, when it issued its fourth order regarding Ruggenberg's failure to produce the trial transcript. In this order the court granted the Scotts' motion to compel Ruggenberg to return all records of the trial proceedings to the United States Marshall so that another court reporter could attempt to complete the transcript.

Ruggenberg's first formal acknowledgment of her delay in providing the transcript came through her

personal affidavit filed in the Scotts' lawsuit. In her affidavit dated July 24, 1987, Ruggenberg disclosed that in February 1986, when Byers & Anderson had dispatched her to the district court, she had been a court reporter for only one and one-half years. Before working for the court, she had only provided court reporting services to attorneys at depositions. Ruggenberg had not possessed any court reporter certification, either state or national. In her affidavit, Ruggenberg stated that Byers & Anderson had never given her any sort of written guidelines, rules, or instructions for her work at the court. She stated that Byers & Anderson had not provided her any place to complete her work for the court and that, consequently, she had to do that work at home.

Ruggenberg also stated in her affidavit that, although she had been overworked, Byers & Anderson had never dispatched another reporter to the court to relieve her. She said that after leaving the court in August 1986, she had continued to work for Byers & Anderson. Instead of permitting her to complete her

work for the court, Byers & Anderson had dispatched her to other jobs, despite her having a backlog from her court assignment. Ruggenberg stated that Byers & Anderson had required her to give priority to law firms who were its regular clients. Ruggenberg had not felt this was proper, but had acquiesced because she had wanted to keep her job with Byers & Anderson. The work priority issue had caused such friction that Ruggenberg had terminated her employment with Byers & Anderson.

In her affidavit, Ruggenberg also admitted she had been incapable of handling the responsibilities imposed upon her by Byers & Anderson. She acknowledged that she was inexperienced, unqualified, and had not received proper management or apportionment of work from Byers & Anderson.

The ongoing delay in the production of the trial transcript did not end with the court's order requiring Ruggenberg to turn over all of her shorthand notes, computer tapes of shorthand notes, partial transcripts, and tape recordings. When Ruggenberg first delivered

her materials to the United States Marshall, several days' worth of notes and tapes were missing. These were later secured by the Scotts through further requests to Ruggenberg's attorney.

When others attempted to transcribe the trial proceedings, it became apparent that Ruggenberg's notes and tape recordings were often indecipherable. This made transcription by the substitute court reporter difficult and time consuming. Because Ruggenberg's notes were indecipherable, further delay occurred when portions of the tape recordings of the Scotts' trial were sent to the Federal Bureau of Investigation in Washington, D.C., for electronic enhancement.

The trial transcript was finally filed on February 19, 1988. The appeal in the Scotts' case was, therefore, delayed for seventeen months because of Ruggenberg's inaction and omissions. As a result of this delay, Johnathan suffered irreversible damage to his rehabilitation efforts. The Scotts also suffered

substantial damages from lost interest and investment opportunities.

The Ninth Circuit Court of Appeals ultimately upheld most of the elements of damages awarded by the trial court, but reversed and remanded for a recalculation of the award because of the net discount rate used. *Scott v. United States*, 884 F.2d 1280, 1282 (9th Cir. 1989). Shortly before the trial on remand in June of 1990, the Scotts and the Government settled the case for $8,500,000.

Based upon the foregoing facts, the Scotts in their state court action have asserted claims sounding in negligence against both Ruggenberg and Byers & Anderson. Ruggenberg is alleged to be liable for her own negligence. Byers & Anderson is alleged to be vicariously liable for Ruggenberg's negligence, as well liable for their own negligent hiring and supervision of Ruggenberg. The Scotts' lawsuit in Washington State is presently dormant pending the outcome of this case.

SUMMARY OF ARGUMENT

Shanna Ruggenberg, acting as a federal court reporter, is not entitled to absolute immunity for failing to record properly and to transcribe promptly the proceedings of a district court trial. Even if this Court were to find, however, that such absolute immunity exists, such immunity should not extend to the reporting firm of Byers & Anderson, Inc., which never performed any adjudicatory functions. Moreover, an agent's immunity from civil liability generally does not establish a defense for the principal. Restatement (Second) of Agency § 217 (1958). Accordingly, any immunity of Ruggenberg as a government official would not shield her principal, Byers & Anderson, Inc., from tort liability, even when liability is predicated upon respondeat superior.

ARGUMENT

I. Ruggenberg is Entitled, At Most, to Qualified Immunity.

But for the holding of the Ninth Circuit Court of Appeals on court reporter immunity, the petitioner in

this case would have a justifiable cause of action. *Antoine v. Byers & Anderson, Inc.*, 950 F.2d 1471, 1473-74 (9th Cir. 1991). As petitioner notes in his brief, courts in the majority of federal judicial circuits have not held court reporters to be immune from suit, and have recognized that court reporters may be held liable for damages caused by their failure to perform properly their duties. In six other circuits, court reporters are only entitled to qualified immunity. *See, e.g., Smith v. Tandy*, 897 F.2d 355 (8th Cir.), *cert. denied*, 111 S. Ct. 177 (1990).

The Scotts join in the brief of petitioner on this issue, and agree that *Antoine* was wrongly decided. Court reporters should have, at most, a qualified immunity from suit. The Scotts will not burden the Court by repeating the arguments already advanced by petitioner, however.

The purpose of this brief is to demonstrate that even if the Court were to decide that Ruggenberg has

absolute immunity from suit, her principal, Byers & Anderson, is still subject to liability.

II. Any Immunity of Ruggenberg Does Not Absolve Byers & Anderson From Liability.

The Ninth Circuit Court of Appeals in *Antoine* focused its discussion almost exclusively upon Ruggenberg, and not Byers & Anderson. Nowhere in its opinion did the Ninth Circuit expressly state that Byers & Anderson was entitled to the same absolute quasi-judicial immunity Ruggenberg enjoys. The court's sole statement as to the liability of Byers & Anderson was this:

> Because Ruggenberg is entitled to absolute quasi-judicial immunity, the district court correctly determined that Byers & Anderson is likewise not liable to Antoine. This is so regardless of Ruggenberg's employment relation with Byers & Anderson.

950 F.2d at 1477. The Court of Appeals cited no authority to support its holding on this point.

Logically, the court's holding in *Antoine* with respect to Byers & Anderson must have been based upon one or both of the following premises: (1) Byers & Anderson stands on the same footing as Ruggenberg and is entitled to invoke the same absolute quasi-judicial immunity; or (2) Byers & Anderson is immune because the immunity of its agent, Ruggenberg, flows or extends to it as principal. Neither premise is correct.

A. Under Any Immunity Analysis, Byers & Anderson Cannot be Said to Have Functioned in a Judicial Capacity.

In reaching its holding, the Ninth Circuit Court of Appeals in *Antoine* principally relied upon the decision of this Court in *Forrester v. White*, 484 U.S. 219 (1988). The analysis it used was a functional one. For the court, the determinative factor was the offending act itself--not the person who performed the act. The pivotal question for the court was whether the acts of Ruggenberg in question were judicial in nature. Since the court's answer to this question was

"yes," absolute quasi-judicial immunity attached. *Antoine*, 950 F.2d at 1475-76.

Assuming, for the sake of argument, that the Court of Appeals was correct, the same conclusion should not be drawn as to the conduct of Byers & Anderson. To determine whether Byers & Anderson has any immunity under the Ninth Circuit's functional analysis, it must be determined whether Byers & Anderson's challenged conduct was judicial in nature. It clearly was not.

The firm of Byers & Anderson did not function as a federal court reporter. The firm neither recorded court proceedings nor attempted to transcribe those proceedings. All Byers & Anderson did was to contract with the district court to provide reporters who in turn would perform those reporting functions in judicial proceedings.

It is alleged, among other things, that Byers & Anderson was negligent in its hiring and supervision of Ruggenberg. Such employment decisions and responsibilities do not meet the *Forrester* and *Antoine*

prerequisites for absolute quasi-judicial immunity: they are not judicial functions, nor are they part and parcel of the judicial process. These personnel decisions are administrative, not judicial in nature. For this reason, Byers & Anderson is no more entitled to claim the benefit of absolute quasi-judicial immunity than was the judge in *Forrester* who improperly discharged a court employee:

> In the case before us, we think it clear that Judge White was acting in an administrative capacity when he demoted and discharged Forrester. Those acts--like many others involved in supervising court employees and overseeing the efficient operation of a court--may have been quite important in providing the necessary condition of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative. As Judge Posner pointed out below, a judge who hires or fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, or indeed from any other executive branch official who is responsible for making such employment decisions. Such decisions, like personnel decisions made by judges, are often crucial to the efficient operation of public

> institutions (some of which are at least as important as the courts), yet no one suggests that they give rise to absolute immunity from liability in damages under § 1983.

Forrester, 484 U.S. at 229.

Under *Forrester*, there is no justification for granting Byers & Anderson immunity from suit, even if this Court accepts and upholds the functional analysis as applied by the Ninth Circuit in *Antoine*. The acts of Byers & Anderson were not "part of the adjudicatory function." *Antoine*, 950 F.2d at 1475.

B. Any Immunity of Ruggenberg as an Agent Does Not Extend to Byers & Anderson as her Principal.

It is probable that the Ninth Circuit's holding in *Antoine* absolving Byers & Anderson from liability was not predicated upon the conclusion that this reporting firm had acted in any judicial capacity. The court's holding and the context in which it appears suggest that the Court of Appeals simply assumed that Byers & Anderson was immune because Ruggenberg was immune. This assumption is legally flawed.

Any suggestion that Byers & Anderson cannot be held vicariously liable for Ruggenberg's negligence because she is immune from suit demonstrates a misperception as to the nature of vicarious liability. This precise issue was discussed in the context of employee immunity and employer vicarious liability in *Guffey v. Logan*, 563 F. Supp. 951 (E.D. Pa. 1983). The court first discussed the policy underlying vicarious liability as stated by Dean Prosser:

> What has emerged as the modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise which will, on the basis of all past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance to the public and so to shift them to society, to the community at large. Added to this is

> the make weight argument that an employer who is held strictly liable is under the greatest incentive to be careful in the selection, instruction and supervision of his servants, and to take every precaution to see that the enterprise is conducted safely.

563 F. Supp. at 954, *quoting* W. Prosser, *The Law of Torts*, § 69 (1971). In light of these policies, the court stated:

> The predicate then for finding an employer vicariously liable is that the employee was negligent, not that the latter was liable.

Guffey, 563 F. Supp. at 954. No one has ever claimed that Ruggenberg was not negligent, only that she was immune from suit. Byers & Anderson, as Ruggenberg's principal, should be liable for that negligence.

If any presumption exists, it should be that the immunity of an agent does not extend to his or her principal.

> [A]n immunity from liability does not mean that a person did not commit a negligent, harmful act. It only means that for certain policy reasons liability is precluded against that person. In the

> interest of compensation to the victim, it should not be presumed that the immunity from liability given to the negligent person is carried over to others whom the victim can sue. Rather, the presumption should be the other way. Thus, unless the purpose of the immunity would be thwarted by carrying it over to others, suit against the others will lie.

Davis v. Harrod, 407 F.2d 1280, 1284 (D.C. Cir. 1969) (Judge J. Skelly Wright). The rule that a principal is not freed from a lawsuit because of an agent's immunity is followed in most jurisdictions.

> [T]he rule in this Commonwealth and the rule more commonly adopted across the country is that an agent's immunity does not extend to a principal against whom liability is sought under the doctrine of respondeat superior.

Taplin v. Town of Chatham, 453 N.E.2d 421, 423 (Mass. 1983).

This rule of agency has been adopted by the American Law Institute in its Restatement:

> In an action against a principal based on the conduct of a servant in the course of employment:
>
> * * *
>
> (b) The principal has no defense

> because of the fact that: . . . (ii) the agent had an immunity from civil liability as to the act.

Restatement (Second) of Agency § 217 (1958). The holdings of the numerous authorities listed in the citations to this section of the Restatement were recently summarized as follows:

> [W]here the agent has an immunity from civil liability dependent on his or her peculiar status (as for example a family relationship to the injured party, official immunity of some sort or other, infancy, incompetence, etc.) subsection (b) applies and the principal cannot avail itself of its agent's defense.

Sundance Cruises Corp. v. American Bureau of Shipping, 799 F. Supp. 363, 391 S.D.N.Y. (1992).

The State of Washington has adopted and followed this section of the Restatement. *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991). A central issue in *Babcock* was whether DSHS caseworkers of the Washington Department of Social and Health Services should be immune from liability for negligent foster care investigation and placement. The court

ultimately concluded that caseworkers were entitled to a qualified immunity. 116 Wn.2d at 618.

Since the State was also a party to that action, the court was then called upon to decide whether the immunity granted to caseworkers would be extended to the State. The court concluded that the immunity of caseworkers did not extend to the State:

> An agent's immunity from civil liability generally does not establish a defense for the principal. Restatement (Second) of Agency § 217 (1958). Accordingly, the immunities of governmental officials do not shield the governments which employ them from tort liability, even when liability is predicated upon respondeat superior.

Babcock, 116 Wn.2d at 620. *See also, Waller v. State*, 64 Wn. App 318, 333-34, 824 P.2d 1225 (1992). If, as discussed below, the law of Washington State is applied to this aspect of this case, *Babcock* negates any claim by Byers & Anderson that it is immune solely because Ruggenberg may be immune from suit.

It is not being suggested that Washington law controls every aspect of the disposition of this case. It

should, however, apply to the issue of any immunity of Byers & Anderson. It is a general rule that in most fields of activity this Court has refused to find federal pre-emption of state law. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988). There are certain areas of uniquely federal interests, however, were state law is pre-empted and replaced, where necessary, by the so-called "federal common law." *Id.*

One of the areas which this Court has "found to be of peculiarly federal concern, warranting the displacement of state law, is the civil liability of federal officials for actions taken in the course of their duty." 487 U.S. at 505. Thus, even though Ruggenberg apparently was never hired or sworn in as an official federal court reporter, she did act as a federal agent under authority of federal law. It is assumed, therefore, that the scope of her civil liability is controlled by federal, not state, common law. *See, e.g., Howard v. Lyons*, 360 U.S. 593, 597 (1959).

In contrast, as discussed above, Byers & Anderson never acted in an official judicial capacity. It

merely had a contract with the district court to provide court reporters on an emergency basis. It acted as an independent contractor performing under its contract, rather than as an official performing duties as a federal employee. *See Boyle v. United Technologies Corp.*, 487 U.S. at 505.

The lawsuits of Antoine and the Scotts against Byers & Anderson, while obviously arising out of the performance of that contract, are purely private and do not touch the rights and duties of the United States judiciary. This is so because these plaintiffs do not seek to impose upon Byers & Anderson any duty contrary to the duty imposed by the Government contract; that is, to provide competent court reporters to the court. Where the private litigant simply seeks to enforce the contractual duty already owed to the Government, there is no uniquely federal interest which would require displacement of state law. *See Boyle v. United Technologies Corp.*, 487 U.S. at 506-08; *Miree v. DeKalb County*, 433 U.S. 25, 30 (1977). Because no federal interests exist regarding Byers & Anderson, the law of

Washington should be applied. Byers & Anderson should be subject to suit for the acts of its agent, even if that agent is herself immune from suit. *Babcock v. State*, 116 Wn.2d at 620.

Even if this Court were to conclude that Washington law should be displaced by federal common law on this point, the outcome should be the same. While counsel for the Scotts have been unable to locate a decision of this Court which addresses this specific issue, there is no reason to believe that a contrary rule is part of the federal common law. A number of federal cases following the Restatement of Agency have been cited above. No countervailing rule has been located. Thus, even if the Court concludes that there is a uniquely federal interest regarding to the question of the immunity of Byers & Anderson, "[t]hat merely establishes a necessary, not sufficient, condition for the displacement of state law." *Boyle v. United Technologies Corp.*, 487 U.S. at 507. No displacement will occur unless there is a significant conflict between

the state law and a federal policy, interest, or statute. *Id*.

The federal and state interests in this instance are identical. There is no federal interest to be served by permitting Byers & Anderson to escape liability for its actions and those of its agent. The federal and state interests both favor compensating victims suffering loss. "Elemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen v. City of Independence*, 445 U.S. 622, 654 (1980). Immunizing the principal here would thwart that objective. This Court itself has cautioned that when a court is considering granting absolute immunity, the negative aspect of immunity must be kept in mind:

> [O]fficial immunity comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official. Moreover, absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct.

Westfall v. Erwin, 484 U.S. 292, 295, (1988). Byers & Anderson should be held accountable.

CONCLUSION

Based upon the foregoing reasons, the decision of the Ninth Circuit Court of Appeals in *Antoine v. Byers & Anderson, Inc.*, 950 F.2d 1471 (1991), should be reversed and remanded to the district court for a trial on the merits.

Respectfully submitted,

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November 23, 1992.

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RE: United States Supreme Court Review of Antoine v. Byers & Anderson, Inc., 950 F.2d 1471 (Supreme Court Case No. 91-7604)

As the attorney of record for the Petitioner, Jeffery Antoine, I hereby consent to the filing of an amicus brief in support of the Petitioner by Mills, Cogan, Meyers & Swartling in the above matter.

DATE: Nov. 20, 1992

M. Margaret McKeown
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Attorneys for the Petitioner
Jeffery Antoine